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In The

Supreme Court of the United States

October Term, 1995

BRIAN J. DEGEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF PETITIONER

Alan B. Morrison
(Counsel of Record)
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street, NW
Washington, D.C. 20009-1001
(202) 588-1000

Attorneys for *Amicus Curiae*
Public Citizen

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19 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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INTEREST OF *AMICUS*

This brief is being filed with the consents of the parties, which have been submitted to the Court. *Amicus* Public Citizen is a nonprofit organization with more than 100,000 members nationwide. Public Citizen actively works to support government accountability and to assure that the government abides by the law. Through its undersigned attorneys, it served as co-counsel for the petitioners in *Alvarez v. United States*, No. 94-636, *cert. denied*, 115 S. Ct. 1092 (1995), and *Rodriguez v. United States*, No. 94-943, *cert. denied*, 115 S. Ct. 1092 (1995), which also involved applications of the fugitive disentitlement doctrine in the context of civil forfeiture actions.

In this brief, Public Citizen takes no position on civil forfeiture generally, or on whether, on the facts of this case, the government should prevail on the merits of the civil forfeiture action against petitioner. Rather, Public Citizen's concern is under what circumstances, if any, basic fairness and the protections of due process allow the use of the fugitive disentitlement doctrine to deprive individuals of their property without affording them a hearing of any kind on the merits of their claims.

Petitioner raises two objections to the use of the doctrine here. First, he contends that it should never be available in the civil forfeiture context (Petition 16-22), and second, he argues in the alternative that the doctrine was not properly applied to him (Petition 23-25). Like petitioner, Public Citizen has serious doubts as to whether the doctrine may ever be applied to eliminate the right of claimants to be heard in a civil forfeiture case. We recognize, however, that if the doctrine were applied in a civil action after the claimant had been convicted in a related criminal proceeding, and the claimant had fled while his appeal was pending, the application would at least be reminiscent of the context in which the doctrine originated. In any event, since petitioner will argue that the doctrine can never be applied to a civil forfeiture, this brief will be devoted to setting forth certain circumstances, including those presented here, in which the government has abused the doctrine and in which its use should never be allowed.

SUMMARY OF ARGUMENT

The government has plainly over-extended the reach of the fugitive disentitlement doctrine. It has invoked the doctrine in an array of cases with minimal relation to the

circumstances sanctioned by this Court for use of the doctrine, and often to win by default where the government's case had significant weaknesses. In a number of circumstances, it is never proper to apply the fugitive disentitlement doctrine to preclude claimants from attempting to establish that the property subject to seizure belongs to them and is not properly forfeitable under the applicable law. To deprive claimants of their property without any opportunity to be heard can be justified under the Due Process Clause *only* if the government can present the most compelling governmental interest. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Since the doctrine was judicially created, the Court need not decide that the Constitution forbids its application in this and similar cases, but can and should simply refuse to extend it beyond the narrow circumstances in the criminal context in which it was developed.

Because the fugitive disentitlement doctrine has been invoked by government counsel and extended by the lower courts in a number of cases where there is no legitimate basis for it, this Court should make clear those situations in which the doctrine is plainly inapplicable and the reasons therefor. For example, in this case, petitioner has never been tried, let alone convicted, for the offenses that allegedly give the United States the right to seize his property. Moreover, he left the country months before the indictment was obtained, and he was in custody in Switzerland (where he holds citizenship because his father was born there) at the behest of the *United States* when the district court applied the fugitive disentitlement doctrine to dismiss his claim--circumstances that negate any legitimate basis for applying the doctrine in this case.

Without attempting to catalog all of the factors that would render use of the doctrine inappropriate, the doctrine has been applied in at least six situations in which its use is wholly unjustified, two of which (the third and fifth) should render the doctrine unavailable here: (1) the claimant has never been to the United States; (2) the proceeding is unrelated to the criminal case in which the claimant has fled or not appeared; (3) the claimant has never been tried; (4) the criminal charge was filed only after the individual filed a claim in a forfeiture proceeding; (5) the claimant is now in custody; and (6) the property sought to be forfeited is outside the United States.

ARGUMENT

Before delineating the circumstances in which the use of the fugitive disentitlement doctrine in civil forfeiture actions should be prohibited, we begin with a brief explanation of the rationale for the use of the doctrine in the criminal context. The fugitive disentitlement doctrine is based in equity, founded on the proposition that "an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal." *Ortega-Rodriguez v. United States*, 113 S. Ct. 1199, 1203 (1993); *see United States v. Sharpe*, 470 U.S. 675, 681 n.2 (1985).

In the cases in which the fugitive disentitlement doctrine arose, the defendant was convicted of a crime and fled from custody while his appeal was pending. The defendant's presence was not needed for the appeal because the work could all be done by counsel. Nonetheless, the defendant-fugitive was deemed disentitled to maintain the appeal after escaping from custody, on the grounds that any judgment against him would be unenforceable and that it was unfair to

allow him to obtain relief in a case in which he himself was flouting the law. *See Smith v. United States*, 94 U.S. 97 (1896); *see also Molinaro v. New Jersey*, 396 U.S. 365 (1970) (appellant refused to surrender to authorities after bail revoked).

Thus, this Court has approved the fugitive disentitlement doctrine only for defensive purposes to enable a court to reject the affirmative claims of those who flout the court's processes in the same matter. As discussed below, however, in at least six sets of circumstances, the government has unjustifiably invoked the doctrine to obtain dismissal of individuals' claims in civil forfeiture cases initiated by the government, and thus to take title of the property at issue without any adjudication of the merits.

1. *Claimant Has Not Been To The U.S.* The government has used the fugitive disentitlement doctrine to deny a claimant who was indicted in the United States, but has never been to the United States (or has not been here during the relevant time period), the right to contest the validity of the forfeiture. *See, e.g., Alvarez*, No. 94-636, *cert. denied*. 115 S. Ct. 1092 ("fugitives" were citizens and residents of Colombia); *see also Daccarett-Ghia v. Commissioner, IRS*, 70 F.3d 621 (D.C. Cir. 1995) (same, in tax proceeding). In such circumstances, it is nothing sort of fanciful to accuse the claimant of "fleeing" the United States to avoid criminal prosecution. The application of the doctrine in such circumstances, even if the pending indictment and the civil forfeiture action allegedly involve the same set of transactions, imposes a civil penalty for non-appearance and acts as an end run on the limits of extradition jurisdiction.

Moreover, the physical presence of the claimant in this country is wholly unnecessary in at least some civil forfeiture actions. For instance, if the claimant could establish by unconverted documentary evidence that the property in question was acquired prior to the time that the allegedly criminal activity commenced, the claimant's presence would be unnecessary to prove that the property was not the product of illegal conduct. Similarly, if documentary evidence showed that the property passed by inheritance from a person admittedly not involved in the alleged criminal conduct, there would be no basis for requiring the individual claimant to come to the United States to establish her claim to the property at issue.

Whether or not the absence of a claimant from the United States may hamper the claimant's ability to defeat the forfeiture, the act of *remaining* outside the United States should not automatically entitle the government to prevail in a civil forfeiture case on the theory that the failure to travel to the United States is the functional equivalent of fleeing custody.[1]

2. *Unrelated Civil Action.* In other cases, the government has attempted to use the fugitive disentitlement doctrine to eliminate the fugitive's claim in cases unrelated to the criminal case in which the flight occurred. The D.C. Circuit's recent decision in *Daccarett-Ghia v. Commissioner*, *supra*, illustrates such an attempted improper use by the

[1]If the federal government can apply the doctrine to one who has never been to this country, at least during the relevant time frame, presumably states could use the same device with respect to property within their domains or, as item 6 illustrates, perhaps even outside of it.

government. There, the government tried to use the fugitive disentitlement doctrine to dismiss a taxpayer's petition for redetermination of certain taxes because the taxpayer had failed to answer a criminal indictment in New Jersey district court involving the same funds at issue in the Tax Court proceeding. The government had also brought a civil forfeiture action to obtain those and other funds, but had been denied forfeiture of the funds at issue in the Tax Court action. In the Tax Court, the issue was only whether a tax was due, not the source of the funds. The D.C. Circuit correctly rejected the government's effort to disentitle the taxpayer because the taxpayer's presence was not required at the Tax Court proceeding and the taxpayer's fugitive status did not jeopardize the enforceability of any judgment rendered by the Tax Court in the matter. 70 F.3d at 627-28.

In line with the D.C. Circuit's reasoning in *Daccarett-Ghia*, the fugitive disentitlement doctrine should not be available in cases that are not directly connected to the criminal case from which the individual's fugitive status derives. Indeed, if the doctrine could be applied in this manner, the government could condemn the land of persons who refused to answer criminal charges in the United States and then disallow any attempt to establish the value of the property based on their failure to come to this country to respond to an indictment.

3. *Claimant Not Yet Tried.* The government has also used the fugitive disentitlement doctrine, as it did here and in *Alvarez* and *Rodriguez*, where it has not obtained a conviction in the related criminal case. That application should also be forbidden.

In a criminal case, the government has the burden of proof to establish guilt beyond a reasonable doubt. In a civil

forfeiture case, the government has the burden to establish that the requirements of the forfeiture statute have been met. Just as the government cannot obtain a criminal conviction based solely on the absence of the defendant, the government should not be permitted to obtain a civil forfeiture based solely on the failure of the claimant to appear in a separate, related criminal case. This rule should hold true whether or not the claimant-defendant was ever in custody, and whether or not she fled before or after the indictment, even if the defendant was aware that charges were about to be brought. To deny a fleeing defendant the right to appeal a conviction after a full trial is one thing; to deny a civil claimant all rights to her seized property solely because of her willful absence from a criminal case is quite another. Indeed, in the latter circumstance, the claimant effectively loses the presumption of innocence as to a crime for which she has never been tried, and the government does not even have to prove its forfeiture case.

No one has ever suggested that if a defendant in a criminal case flees prior to conviction, the government can use the fugitive disentitlement doctrine to deny the right to a jury trial on the issues involved in the criminal charge. Yet use of the doctrine to disallow claims in a civil forfeiture case, where the government's civil case is based upon allegations of criminal activity, trumps the constitutionally-based presumption of innocence, allowing the government to forfeit an individual's property based on a mere allegation that the property was derived from criminal activity. This result is even more troubling because the government directly profits from the forfeiture. *See United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 502 (1993) (due process "is of particular importance here, where the

government has a direct pecuniary interest in the outcome of the proceeding").

In many respects, invoking the doctrine in such circumstances is the functional equivalent of the practice rejected in *Shaffer v. Heitner*, 433 U.S. 186 (1977), in which the plaintiff sought to force individuals to come to Delaware to defend against loss of their property in a forfeiture action in order to subject the individuals to the personal jurisdiction of the Delaware court in a separate case. Just as it was improper there for Delaware to forfeit the defendants' property worth about $1.2 million, unless the defendants came to Delaware to defend against claims of about $14 million, *id.* at 190 nn.2-3, 192 n.7, 209, it is improper for the government to gain automatic forfeiture of the property of a non-resident claimant, unless he comes to the United States to defend against a criminal charge, where the government is unable to extradite him. While the government may proceed with its forfeiture action, a claimant should not lose all his rights to contest the forfeiture simply because he refuses to stand trial in a criminal case.

4. *Retaliatory Indictment*. Another category of misuse of the fugitive disentitlement doctrine is best illustrated by the facts in *Alvarez* and *Rodriguez*. In those cases, which are not unique, the claimants, who had never been charged with a crime, filed objections in forfeiture proceedings, asserting that the property at issue was theirs and was not derived from criminal activity. Only after they had filed their claims and had moved to dismiss the forfeiture proceedings for lack of *in rem* jurisdiction over the property did the government seek to add their names to an indictment obtained many months before. When the claimants then cancelled their scheduled depositions and refused to come to the United

States, where they surely would have been arrested, the district courts in the forfeiture actions granted government motions and allowed the property to be forfeited, without affording the claimants any opportunity to prove their claims.

As this Court has recognized, the oversight exercised by federal grand juries considering indictments of individuals whom a prosecutor seeks to charge is minimal at best. *United States v. Williams*, 504 U.S. 36 (1992) (court will not hear challenge to indictment based on inadequate, unreliable, or incompetent evidence). Although it may not be literally true that, as a former New York State Chief Judge once put it, a grand jury would "indict a ham sandwich" if the prosecutor asked nicely, *The Supreme Court, 1991 Term - Leading Cases*, 106 Harv. L. Rev. 163, 200 & n.65 (1992) (citing N.Y. Times, Feb. 18, 1985, at A16), a grand jury surely will add another defendant to a massive drug conspiracy indictment, especially if, as in *Alvarez*, the defendant is from South America. Moreover, not every drug-related indictment results in a conviction, no matter how fervently the prosecutor believes the accused to be guilty. *See, e.g.*, H. Mintz, *Fort Reno's Obsession*, The American Lawyer 55 (May 1995).

Indictments represent allegations only. Indictments returned after claims are filed in civil forfeiture actions are almost inevitably the product of retaliation or the government's efforts to obtain forfeiture without having to prove its case. The refusal to answer such subsequent indictments should never be the basis for invoking the doctrine of fugitive disentitlement.

5. *Defendant In Custody*. In *Degen*, the government seeks to use the fugitive disentitlement doctrine even after the defendant has been placed in custody. Under such

circumstances, applying the doctrine imposes an additional penalty for eluding arrest, fleeing, or simply being outside the United States for a time. And under such circumstances, the application of the doctrine cannot be justified by any equitable notion or on the ground that the claimant cannot be physically present (since his physical presence is now in the government's control). Nor is application of the doctrine justified on the ground that the defendant is not entitled to avail himself of the courts because he previously failed to appear or fled, since once in custody the individual can defend himself in the criminal case and can appeal if convicted. See *Ortega-Rodriguez*, 113 S. Ct. at 1208-09 (defendant may appeal conviction, where he became fugitive after conviction but before sentencing, and was returned to custody before appeal filed, unless defendant's actions impacted appellate process). Thus, disentitlement in a civil forfeiture proceeding in such circumstances does not serve the purposes of the doctrine as enunciated by this Court and acts only to facilitate the government's attempt to forfeit property of others, based on its as yet unproven allegations.

Apparently, the government's position is that it may invoke the doctrine to obtain summary judgment in a civil forfeiture action as soon as a claimant refuses to travel to this country to stand trial. If the government were permitted to do that, and if the claimant eventually appeared for trial and was acquitted, the government could still keep the property based on the then-final judgment that it had obtained solely by invoking the fugitive disentitlement doctrine, with no proof of forfeitability. That result cannot be the law, yet it seems the inevitable consequence of the government's position regarding former fugitives who are tried after being taken into custody.

6. *Property Not In United States*. In a number of cases, the government has sought forfeiture of property physically located outside the United States, either from an office of a U.S. company (most often a bank or a brokerage house), or from a wholly foreign entity. In the former cases, the court issues an order against the U.S. company to obtain enforcement of the forfeiture judgment through its overseas branch. In the latter, the government delivers the order of forfeiture to the foreign institution (assuming that it has no assets of its own in the United States), hoping to obtain its cooperation. *See, e.g., Alvarez*; *Rodriguez*. In either case, the government should not be permitted to use the doctrine.[2]

Where the property is not in the United States, the court in which the civil forfeiture action is pending will often not have *in rem* jurisdiction over the property. Yet, by obtaining dismissal of claims based on the disentitlement doctrine, the government is able to forfeit property before the court even considers whether it has jurisdiction over the action in the first place. *See Alvarez*, No. 94-636, petition for writ of *cert*. at 10-12. Thus, the government has used the doctrine to avoid judicial scrutiny of both a court's jurisdiction over a case and the merits of the government's allegations as to the property's origins and forfeitability.

Moreover, even putting aside issues of government manipulation of the system and due process concerns, there is no basis for applying the fugitive disentitlement doctrine where the property is not located in the United States. It is

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[2] In many such cases, the seizure of foreign property involves other situations that should also not give rise to use of the disentitlement doctrine (most particularly the foreign resident who has never been to the United States).

one thing for the United States to attempt to enforce its civil forfeiture laws in this country. It is quite another to forfeit the foreign assets of individuals who have never been afforded an opportunity to contest the applicability of our forfeiture laws to their property, the district court's jurisdiction, or the merits of the government's allegations.

* * * * *

The government may claim that removing the sword of the fugitive disentitlement doctrine in any of these six situations will result in huge losses to it. The problem with that argument is that it improperly confuses the result of automatic forfeiture, which the doctrine produces, with the government's right to proceed on the merits, which is an entirely different question. The government has a right to civil forfeiture only where the property at issue was derived from illegal conduct. Without the advantage of the fugitive disentitlement doctrine, the government will still be able to obtain forfeiture of any property found by a court to satisfy the requirements of the forfeiture laws.

The difference can clearly be seen from the facts of *Alvarez* where, prior to indictment, the claimants had submitted information to the government and were willing to come to the United States to have their depositions taken to establish the validity of their claims. Surely, in that case, the government cannot maintain that the claimants were hiding abroad and could not be cross-examined regarding their defenses. Yet, after the claimants questioned the court's jurisdiction over their property, the government obtained an indictment against them, thereby guaranteeing the claimants' incarceration if they stepped onto United States soil. When they therefore refused to come to the United States, the government asserted that they were fugitives, and the court

struck their claims to the property as the price for "fleeing" from the United States charges. No adjudication on the merits ever occurred. No court will ever consider whether the government took property to which it had no legal right.

The government cannot and should not take property without due process of law. The fugitive disentitlement doctrine, as currently abused by the government, allows the government to skip the proof and take the property based solely on the government's assertion of a right to forfeit it--whether or not the claimant has ever been in the United States, whether or not the property is located in the United States, and whether or not the claimant performed any affirmative act to evade custody in the criminal case. This Court should put an end to the government's massive over-reaching and require the government to establish its right to seize property of individuals accused of crimes. The government should not be permitted to require civil claimants to submit to arrest in exchange for the right to assert claims to their own property.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

Alan B. Morrison
(Counsel of Record)
Allison M. Zieve

Public Citizen Litigation Group
1600 20th Street, NW
Washington, D.C. 20009-1001
(202) 588-1000

Attorneys for *Amicus Curiae*
Public Citizen

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